The Free Market
Environmental Law Clinic

REQUEST UNDER THE FREEDOM OF INFORMATION ACT

October 14, 2013

EPA Region 10 FOIA Officer
U.S. EPA, Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

RE: FOIA Request – Certain Agency Records Referencing Certain Indian Tribes

BY ELECTRONIC MAIL: r10.foia@epa.gov, copy to epa-seattle@epa.gov

Region 10 Freedom of Information Officer,

On behalf of the Energy & Environment Legal Institute (EELI) and the Free Market Environmental Law Clinic (ELC) as co-requester and EELI counsel, please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq. Both entities are non-profit public policy and/or legal institutes organized under section 501(c)3 of the tax code and with research, legal, investigative journalism and publication functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Please provide us, within twenty working days,[1] copies of **all emails, text messages, or instant messages 1)** sent **to or from** (including also as cc: or bcc:) any EPA-assigned account of,

[1] *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion at page 25, *infra*.

or EPA-related emails or text messages to or from any other account used at any time for work-related correspondence by, **2)** staff or officials of EPA Region 10's Seattle Office of Air, Waste and Toxics (AWT), **3)** Seattle Office of Water and Watersheds (OWW), and/or **4)** its Lacey, Washington, Operations Office, **5)** which are dated from January 1, 2012, to the date you process this request, and **6)** which include one or more of the following words: "Crow", "Apsáalooke", "Blackfoot", and/or "Blackfeet", **7)** ***and*** **either** "coal", "export" or "terminal".

Upon consideration EPA will see that these terms ensure this is a narrow request.

You may exclude emailed copies of press releases which include no commentary or merely "FYI" with no other commentary.

We write cognizant of EPA's facially improper fee waiver denial, and thereby denial, of a substantively related request (EPA-R10-2013-008285), dated July 16, 2013, on the asserted basis that we failed to assert an intention to broadly disseminate the records. As we noted in our August 19, 2013 appeal (which EPA has taken extensions of time and, prior to the partial government shutdown, passed its permissible time to respond to a straightforward appeal of a facially improper denial).

In that appeal we also noted factors indicating that EPA's facially inaccurate denial was possibly a delaying tactic. We urge EPA to avoid repeating that experience here. We intend to fully protect our appellate rights in this matter. Please therefore note our assurance of our intention and ability to broadly disseminate responsive information, detailed further, *infra*.

EPA Owes EELI and ELC a Reasonable Search, which Includes a Non-Conflicted Search

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994).

It is well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (*quoting Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the "'general philosophy of full agency disclosure'" that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). The act is designed to "pierce the veil of administrative secrecy and to open agency action to the light of scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id*.

A search must be "reasonably calculated to uncover all relevant documents." *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is "reasonable," courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of disclosure").

The reasonableness of the search activity is determined ad hoc but there are rules, including that the search must be conducted free from conflict of interest. (In searching for relevant documents, agencies have a duty "to ensure that abuse and conflicts of interest do not occur."

Cuban v. S.E.C., 744 F.Supp.2d 60, 72 (D.D.C. 2010). See also *Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting Department of Justice for the fact that it "was aware that employee had withheld records as 'personal' but did not require that 'he submit those records for review' by the Department.")).

EELI and ELC expect this search to be conducted free from conflict of interest.

Withholding and Redaction

Please identify and inform us of all responsive or potentially responsive records within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive record(s) such objection applies.

The requested records are requested for their likely relationship to a high-profile, extraordinarily important public discussion taking place, about regulatory approval before agencies other than USEPA, over what used to be six proposals for a Northwest coal export terminal. They will particularly focus on impacts on and consideration of certain Indian tribes being harmed by efforts to kill such proposed terminals. These proposals are not, however, before EPA for regulatory approval. Responsive records are far more likely, therefore, to involve Agency employees expressing opinion on a topic of public interest, or working with environmentalist pressure groups, than any possible actual deliberative process as implicated in, *e.g.*, *Jordan v. Do*J, 591 F.2d 753, 774 (D.C. Cir. 1978).

Pursuant to high-profile and repeated promises and instructions from the President and Attorney General (see, *infra*), we request EPA err on the side of disclosure and not delay

production of this information of great public interest through lengthy review processes to deliberate which withholdings they may be able to justify. This is particularly true for any information that EPA seeks to claim as reflecting (the oft-abused, per even Attorney General Holder) "deliberative process", in the absence of any actual formal EPA deliberation being underway truly antecedent to the adoption of an Agency policy on the relevant matters. It is also true for correspondence which may be embarrassing for the activism or close personal relationships with, *e.g.*, environmental activists, it reveals but which embarrassment -- as precedent makes abundantly clear -- does not qualify a record as "personal".

Therefore, if EPA claims any records or portions thereof are exempt under *any* of FOIA's discretionary exemptions we request you exercise that discretion and release them consistent with statements by the President and Attorney General, *inter alia*, that "**The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today" (President Barack Obama**, January 21, 2009), and "**Under the Attorney General's Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged**. Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5." (Department of Justice, Office of Information Policy, OIP Guidance, "Creating a 'New Era of Open Government'").

Nonetheless, if your office takes the position that any portion of the requested records is exempt from disclosure, please inform us of the basis of any partial denials or redactions. In the event that some portions of the requested records are properly exempt from disclosure, please

disclose any reasonably segregable, non-exempt portions of the requested records. See 5 U.S.C. §552(b).

We remind EPA it cannot withhold entire documents rather than producing their "factual content" and redacting the confidential advice and opinions. As the D.C. Court of Appeals noted, the agency must "describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents." *King v. Department of Justice*, 830 F.2d 210, at 254 n.28 (D.C. Cir. 1987). As an example of how entire records should not be withheld when there is reasonably segregable information, we note that basic identifying information (who, what, when) is not "deliberative". As the courts have emphasized, "the deliberative process privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts* unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process." *See Mead Data Central v. Department of the Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (emphasis added).

If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. Department of the Air Force*, 455 F.2d at 261. Further, we request that you provide us with an index of those documents as required under V*aughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA" pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959

(D.C. Cir. 1979), and "describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information." *King v. Department of Justice*, 830 F.2d at 223-24.

Claims of non-segregability must be made with the same practical detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Satisfying this Request contemplates providing copies of documents, in electronic format if you possess them as such; otherwise, photocopies are acceptable.

Please provide responsive documents in complete form, without any deletions or other edits and with any appendices or attachments and related email, text or instant message threads, as the case may be.

Request for Fee Waiver

This discussion is lengthy solely due to recent EPA behavior, including in our own experience with the Agency and specifically with Region 10 in the context of a coal export terminal-related FOIA -- improperly using denial of fee waivers to impose delay and require further expenditure of assets, representing an economic barrier to access and an

improper means of delaying or otherwise denying access to public records, despite our plainly qualifying for fee waiver. We are not alone in this broader experience.[2]

1) Disclosure would substantially contribute to the public at large's understanding of governmental operations or activities, on a matter of demonstrable public interest

The information sought by EELI and ELC in this FOIA request will be used to better the public's understanding of EPA staff involvement in the ongoing public and (other) governmental debate over a Northwest coal export terminal, a key target of most major environmental groups for the lifeline it would provide to the domestic coal industry as it confronts EPA's own efforts restricting the ability of utilities to burn coal, and Interior, Bureau of Indian Affairs and other federal agencies' efforts to restrict the ability to mine coal. Particularly, responsive records should reflect discussions by Agency staff with parties both inside and outside government about this topic. Such discussions may include correspondence with or about the efforts of special interest or pressure groups which have aggressively mobilized to kill the chances of any coal export terminal, whether or not those with which EPA has a close working relationship pursuing a shared regulatory agenda and in some cases substantially funds. These groups are "actively engaged in lobbying and seeking funding from both government agencies and private firms in

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[2] *See* February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of "exorbitant fees" under FOIA as a barrier to access, available at http://images.politico.com/global/2012/03/aclufffeewvrfoialtr.pdf; *see also National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); *see also* "Groups Protest CIA's Covert Attack on Public Access," OpentheGovernment.org, February 23, 2012, http://www.openthegovernment.org/node/3372.

return for promoting their agenda",[3] lobby and litigate[4] for greater authority for EPA, run billboard campaigns against politicians who challenge EPA,[5] and even sometimes have received tens of millions of dollar from EPA over the years to fund their programs.[6]

Additionally, these records, if produced, will shed light on the Agency's compliance with its obligations to maintain such records of involvement in EPA-related discussions, using EPA assets/resources, as required by federal record-keeping and disclosure laws.

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[3] James T. Bennett, Pandering for Profit: The Transformation of Health Charities to Lobbyists (December 14, 2011). GMU Working Paper in Economics No. 11-54. Available at SSRN: http://ssrn.com/abstract=1972369 or http://dx.doi.org/10.2139/ssrn.1972369, published in the Virginia Economic Journal, Volume 17, 2012, pp. 33-64. Bennett is a George Mason University "Eminent Scholar" holding, *inter alia*, the William P. Snavely Chair of Political Economy and Public Policy.

[4] *See, e.g.*, American Lung Association, "American Lung Association Joins Suit Against EPA over Pollution Standards", Press Release, February 14, 2012, http://www.longislandpress.com/2012/02/14/american-lung-association-joins-suit-against-epa-over-pollution-standards/.

[5] *See, e.g.*, Amanda Carey, "American Lung Association plasters Rep. Upton's district with provocative ad," DAILY CALLER, March 23, 2011, http://dailycaller.com/2011/03/23/american-lung-association-plasters-rep-uptons-district-with-provocative-ad/.

[6] Dennis Ambler, "Samples of US Government Grants to the Global Warming Industry," Science and Public Policy Institute, Washington, DC, August 22, 2012 http://scienceandpublicpolicy.org/images/stories/papers/originals/sample_grants.pdf citing to EPA data at http://yosemite.epa.gov/oarm/igms_egf.nsf/Reports/Non-Profit+Grants?OpenView.

We cite ALA as a leading example of national groups promoting this agenda, though by no means are these examples limited to to ALA. For another example, Sierra Club employs a similar model and has close working relationships with senior Agency officials. For example, in 2012 Sierra promptly hired Defendant's Region 6 Administrator Al Armendariz expressly to continue his work against a particular domestic industry (coal), after he left EPA when videotaped acknowledging he informing his EPA staff of his "philosophy of enforcement", "It was kind of like how the Romans used to, you know, conquer villages in the Mediterranean. They'd go in to a little Turkish town somewhere, they'd find the first five guys they saw, and they'd crucify them. And then, you know, that town was really easy to manage for the next few years." *See, e.g.*, Broder, John M., "E.P.A. Official in Texas Quits Over 'Crucify' Video", NEW YORK TIMES, May 1, 2012, http://www.nytimes.com/2012/05/01/us/politics/epa-official-in-texas-resigns-over-crucify-comments.html?_r=0, which also links to the videotaped remarks, viewed October 13, 2013.

These records are "agency records" under federal record-keeping and disclosure law, represent Agency officials communicating with groups with which it has close working relationships including occasionally publicly financing them, with which EPA is ideologically aligned, particularly the Region 10 office(s).

The records are of significant public interest for reasons including the importance of the prospective export terminal(s) to a major domestic industry on which the U.S. currently depends as its largest source of electricity and which employs many thousands both directly and indirectly, but which the current administration has targeted for decline in a what is widely described as its "war on coal." That effort so far extends to the point of promoting policies that the President has acknowledged would lead to "bankrupt[ing]" the industry's customers if they sought to expand use of certain the industry's product for electricity generation, but in addition to impeding consumption, also to the aforementioned efforts to block further domestic production. We suggest that, given the priority placed on stopping a Northwest export terminal, many conversations also exist, created and held on public resources, reflecting other sentiments and interests among public employees in EPA Region 10 to extend that campaign to blocking the ability to export coal, depriving it of that market, as well.

We emphasize that **a requester need not demonstrate that the records would contain any particular evidence, such as of misconduct.** Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir. 2003).

As such and for the following reasons EELI and ELC request waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester"); see also 40 C.F.R. §2.107(l), and (c).

The information sought in this request is not sought for a commercial purpose. Requesters are organized and recognized by the Internal Revenue Service as 501(c)3 educational organizations (not a "Religious...Charitable, Scientific, Literary, Testing for Public Safety, to Foster National or International Amateur Sports Competition, or Prevention of Cruelty to Children or Animals Organization"). Neither group charges for copies of its reports. Information provided to EELI and ELC cannot result in any form of commercial gain to EELI or ELC. With no possible commercial interest in these records, an assessment of that non-existent interest is not required in any balancing test with the public's interest.

As non-commercial requesters, EELI and ELC are entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010). Specifically, the public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. "The legislative history of the fee waiver provision reveals that it was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,' in particular those from journalists, scholars and nonprofit

public interest groups." *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984); SEN. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).[7]

Congress enacted FOIA clearly intending that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." *Ettlinger v. FBI*, citing CONF. COMM. REP., H.R. REP. NO. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI*.

Given this, "insofar as... [agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information." *Better Gov't v. State* (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that "'chill' the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage." *Id*. As such, agency

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[7] This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, public interest non-profits that "rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." *Better Gov't v. State*. They therefore, like Requester, "routinely make FOIA requests that potentially would not be made absent a fee waiver provision", requiring the court to consider the"Congressional determination that such constraints should not impede the access to information for appellants such as these." *Id*.

implementing regulations may not facially or in practice interpret FOIA's fee waiver provision in a way creating a fee barrier for requester.

"This is in keeping with the statute's purpose, which is 'to remove the roadblocks and technicalities which have been used by… agencies to deny waivers.'" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987) (quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

Requesters' ability to utilize FOIA -- as well as many nonprofit organizations, educational institutions and news media who will benefit from disclosure -- depends on its ability to obtain fee waivers. For this reason, "Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the 'public benefit' test for FOIA fee waivers. This waiver provision was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,' in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as '"toll gates" on the public access road to information.'" *Better Gov't Ass'n v. Department of State*.

As the *Better Government* court also recognized, public interest groups employ FOIA for activities "essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the

fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." That is true in the instant matter as well.

Indeed, recent EPA assertions to the undersigned in relation to various recent FOIA requests, both directly and through counsel reflecting its pique over the robustness of said FOIAing efforts (and subsequent, toned-down restatements of this acknowledgement), prove too much in the context of EPA now serially denying fee waiver requests from groups deemed as unfriendly, conservative, libertarian, or otherwise not among the roster of those with which EPA is working closely to craft a shared regulatory agenda,[8] given that it reaffirms that the groups undersigned represents on FOIA matters are precisely the sort of group the courts have identified in establishing this precedent.

Courts have noted FOIA's legislative history to find that a fee waiver request is likely to pass muster "if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286.

This information request meets that description, for reasons both obvious and specified.

The subject matter of the requested records specifically concerns identifiable operations or activities of the government. The requested records, pertaining to EPA Region 10 staff discussing a project currently under consideration by various other government agencies

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[8] See the matters underlying the extant EPA Inspector General Investigation into EPA's disparate application of FOIA fee waivers on initial determination. *See also, e.g.*, Ben Geman, "EPA to review claims of bias against conservatives amid fight over IRS", THE HILL, May 16, 2013, http://thehill.com/blogs/e2-wire/e2-wire/300167-epas-internal-watchdog-to-probe-bias-claims-amid-gop-comparisons-to-tax-scandal; see also http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.Blogs&ContentRecord_id=c27df7a8-05c9-6f77-6358-176a2c04e854.

at the federal and state level, which has been elevated as a top priority by the most influential pressure groups -- those whose activism does coincide with Agency priorities -- would contribute significantly to public understanding of the operations or activities of the government about which information there is no other information in the public domain.

As such, release of these records also directly relates to high-level promises by the President of the United States and the Attorney General to be "the most transparent administration in history". This transparency promise, in its serial incarnations, demanded and spawned widespread media coverage, and then of the reality of the Administration's transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (see, *e.g*., an internet search of "study Obama transparency").

Particularly after undersigned counsel's recent discoveries using FOIA, related publicizing of certain EPA record-management and electronic communication practices and related other efforts to disseminate the information, the public, media and congressional oversight bodies are very interested in how widespread are the violations of this pledge of unprecedented transparency and, particularly, in the issue central to the present request.

This request, when satisfied, will further inform this ongoing public discussion.

Further, EELI and ELC have conducted several studies on the operation of government, government ethics and the degree to which EPA follows its own rules and laws controlling its

administrative activities. In reviewing EPA's document production under *ATI v. EPA*,[9] EELI (formerly known as ATI) and ELC are now engaged in an analysis of these relationships and EPA's transparency when it comes to groups with which EPA has demonstrably close relationships pursuing a shared regulatory agenda. EPA interactions with pressure groups dedicated in large part to influencing and/or generating support for Agency policy represents governmental operations or activities. On its face, therefore, information shedding light on this relationship satisfies FOIA's test.

For the aforementioned reasons, potentially responsive records unquestionably reflect "identifiable operations or activities of the government" with a connection that is direct and clear, not remote.

The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case.

Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in

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[9] Re: HQ-FOI-0152-12 and HQ-FOI-0158-12, filed as *American Tradition Institute v. EPA*, CV: 13-112 U.S. District Court for the District of Columbia. This filing also led to unfavorable press coverage (*see, e.g.*, "Public interest group sues EPA for FOIA delays, claims agency ordered officials to ignore requests", WASHINGTON EXAMINER, January 28, 2013, http://washingtonexaminer.com/public-interest-group-sues-epa-for-foia-delays-claims-agency-ordered-officials-to-ignore-requests/article/2519881), and also involved facially improper fee waiver denials to undersigned.

ATI recently changed its name to more accurately reflect its focus. *See e.g.* Press Release, E&E Legal, THE ENERGY & ENVIRONMENT LEGAL INSTITUTE, October 3, 2013, http://gpm.r.mailjet.com/35SR.html?a=53W4eR&b=9d0175cc&email=chornerlaw@aol.com. *See also* Patrick McNamara, *Environmental group sues to get UA records*, ARIZONA DAILY STAR, October 5, 2013, http://azstarnet.com/news/local/environmental-group-sues-to-get-ua-records/article_b7dd22e6-7171-5af5-a26a-4e2f00ae8b44.html.

relation to the subject matter of the request. The requested records have an informative value and are "likely to contribute to an understanding of Federal government operations or activities" just as did *ATI v. EPA*: this issue is of significant and increasing public interest, in large part due to the success the Administration's ideological allies have had in discouraging potential investors in pursuing projects to facilitate export of an abundant domestic energy resource. Further, the issues of importing and exporting energy resources has occupied an elevated place in public policy discussion as we consider, e.g., the Keystone XL pipeline, and export terminals for newly abundant natural gas. This is not subject to reasonable dispute.

However, **the Department of Justice's Freedom of Information Act Guide makes it clear that, in the DoJ's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain.** There is no reasonable claim to deny that, to the extent the requested information is available to any parties, this is information held only by EPA's correspondents. It is therefore clear that the requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

Given the economic and social impact of the terminal if approved, both regionally and nationally, it is important for information relating to discussions with those in and outside of the agency to be made public. In our system, it is the public who must ultimately be persuaded one way or the other on the policies discussed, and such a decision is only properly made with all appropriately available information. That information includes relevant, non-exempt public records.

Further, given the tremendous regional and national public and media interest in prospective export terminals (with five of seven active proposals to our knowledge having been shelved, as of subsequent news of similar slowdowns out of Region 6[10]), the notion that disclosure will not significantly inform the public at large about operations or activities of government is facially absurd. There has been significant media coverage and public interest in the initiative, and the pressure-group campaigns against them, which have led to proposed projects being dropped.[11] In fact, export terminal proposals have engendered a wider national debate on the role of coal in this Administration's "climate" and energy plans.[12]

Further, the impact of this decision on Indian tribes, and that EPA is disregarding this, is also of increasing national attention and interest.[13]

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[10] Manuel Quinones, *Coal: company scuttles plan for Texas export terminal*, ENERGY & ENVIRONMENT DAILY, Aug. 21, 2013, http://www.eenews.net/greenwire/2013/08/21/stories/1059986284 (subscription required).

[11] *See e.g.*, Clifford Krauss, *Coal Industry Pins Hopes on Exports as U.S. Market Shrinks*, NEW YORK TIMES, June 14, 2013, http://www.nytimes.com/2013/06/15/business/energy-environment/a-fight-over-coal-exports-and-the-industrys-future.html?pagewanted=all&_r=0. *See also*, Manuel Quinones, *Northwest governors face Keystone-like conundrum over export terminals*, ENERGY & ENVIRONMENT DAILY, May 21, 2013; *see also* Manuel Quinones, *Company scraps plans for Wash. export terminal*, ENERGY & ENVIRONMENT NEWS, May 8, 2013. Also see extensive coverage in *Seattle Post-Intelligencer*, internet search for "northwest export terminal".

[12] Lynne Peeples, *Coal Exports Contradict Obama's Climate Pledge, Critics Say,* THE HUFFINGTON POST, Jul. 25, 2013, http://www.huffingtonpost.com/2013/07/25/coal-exports-obama-climate_n_3646584.html.

[13] *See e.g.*, Terry L. Anderson and Shawn Regan, *The War on Coal is Punishing Indian Country*, WALL STREET JOURNAL, October 12, 2013, http://online.wsj.com/article/SB10001424052702304906704579111030189700024.html?mod=WSJ_Opinion_LEFTTopOpinion.

Thus, disclosure and dissemination of this information will facilitate meaningful public participation in the policy debate, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of your agency's dealings with interested parties outside the Agency and interested -- but not formally involved -- employees who may nonetheless be having an impact on the federal permitting process, state and local processes, and/or activism on the issue.

The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requesters or a narrow segment of interested persons. Precisely as with the records being produced by EPA in *ATI v. EPA*, and indeed in conjunction with the efforts to present information for public scrutiny, EELI and ELC intend to present these records for public scrutiny and otherwise to broadly disseminate the information it obtains under this request by the means described, herein. EELI and ELC counsel have spent a great portion of their respective energies over the past two-plus years promoting the public interest advocating sensible policies to protect human health and the environment, including through obtaining information from EPA, routinely receiving fee waivers under FOIA (until recently, but even then on appeal) for its ability to disseminate public information. These FOI or open-records efforts have also obtained substantial media coverage, including in local, state, national and international English-language outlets.

Further, as demonstrated herein and in the above litany of exemplars of newsworthy FOIA activity, requester and particularly undersigned counsel have an established practice of utilizing FOIA to educate the public, lawmakers and news media about the government's

operations and, in particular, have brought to light important information about policies grounded in energy and environmental policy, like EPA's.[14]

Requesters also intend to disseminate the information gathered by this request via media appearances (the undersigned counsel Horner appears regularly, to discuss his work, on national television and national and local radio shows, and weekly on the radio shows "Garrison" on WIBC Indianapolis and the nationally syndicated "Battle Line with Alan Nathan").

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[14] *See, e.g.*, Stephen Dinan, *Obama energy nominee Ron Binz faces rocky confirmation hearing*, THE WASHINGTON TIMES, Sept. 17, 2013, http://www.washingtontimes.com/news/2013/sep/17/obama-energy-nominee-ron-binz-faces-rocky-confirma/; Stephen Dinan, *Top Obama energy nominee Ron Binz asked oil company employees for confirmation help*, THE WASHINGTON TIMES, Sept. 17, 2013, http://www.washingtontimes.com/news/2013/sep/17/top-obama-energy-nominee-ron-binz-asked-oil-compan/; Stephen Dinan, *Obama energy nominee in danger of defeat*, THE WASHINGTON TIMES, Sept. 18, 2013, http://www.washingtontimes.com/news/2013/sep/18/obamas-energy-nominee-danger-defeat/; Stephen Dinan, *Energy nominee Ron Binz Loses voltage with contradictions, Obama coal rules*, THE WASHINGTON TIMES, Sept. 22, 2013, http://www.washingtontimes.com/news/2013/sep/22/energy-nominee-ron-binz-loses-voltage-in-coal-war-/), Energy (see, e.g., http://www.foxnews.com/scitech/2011/12/16/complicit-in-climategate-doe-under-fire/, http://news.investors.com/ibd-editorials/031210-527214-the-big-wind-power-cover-up.htm?p=2), NOAA (*see, e.g.*, http://wattsupwiththat.com/2012/10/04/the-secret-ipcc-stocker-wg1-memo-found/, http://wattsupwiththat.com/2012/08/21/noaa-releases-tranche-of-foia-documents-2-years-later/), and NASA (*see, e.g.*, http://legaltimes.typepad.com/blt/2010/11/global-warming-foia-suit-against-nasa-heats-up-again.html, which FOIA request and suit produced thousands of pages of emails reflecting agency resources used to run a third-party activist website, and revealing its data management practices; *see also* http://wattsupwiththat.com/2012/10/04/the-cyber-bonfire-of-gisss-vanities/), among others.

EELI and ELC and particularly requesting counsel for his FOIA work are regularly cited in newspapers,[15] law reviews,[16] and trade and political publications.[17]

More importantly, with foundational, institutional interests in and reputations for playing leading roles in the relevant policy debates and expertise in the subject of transparency, energy- and environment-related regulatory policies, the undersigned requesters unquestionably have the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the "public-at-large."

The disclosure will contribute "significantly" to public understanding of government operations or activities. *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is "likely to contribute" to an understanding of specific government operations or activities*.

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[15] Suzanne Goldenberg, *Rightwing US thinktank uses FoI laws to pursue climate scientists*, THE GUARDIAN, July 10, 2012, http://www.theguardian.com/environment/2012/jul/10/american-tradition-institute-climate-science; *see also, e.g.*, Erica Martinson, *Chris Horner, master of FOIA, bedevils the White House*, POLITICO, Jun. 28, 2013, http://www.politico.com/story/2013/06/chris-horner-foia-epa-white-house-93264.html.

[16] *See, e.g.,* Daniel K. Lee and Timothy P. Duane, *Putting the Dormant Commerce Clause Back to Sleep: Adapting the Doctrine to Support State Renewable Portfolio Standards*, 43 Envtl. L. 295 (2013), Lewis & Clark Envtl. L. Rev.

[17] Christopher C. Horner, *EPA administrators invent excuses to avoid transparency*, THE WASHINGTON EXAMINER, Nov. 25, 2012, http://washingtonexaminer.com/epa-administrators-invent-excuses-to-avoid-transparency/article/2514301#.ULOaPYf7L9U; *see also* Christopher C. Horner, *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013, http://www.breitbart.com/Big-Government/2013/01/16/What-s-in-a-Name-EPA-Goes-Full-Bunker-in-Richard-Windsor-EMail-Scandal. *See also, 100 People to Watch this Fall,* THE HILL, August 7, 2013, http://thehill.com/business-a-lobbying/315837-100-people-to-watch-this-fall-?start=7.

As previously explained, the public has no source of information on EPA officials' correspondence or pre-regulatory discussions on the prospective Northwest coal export terminal(s) internally or with special interest/pressure groups, including those with which EPA has very close working relationships and even funds. The EELI-ELC inquiry and any related study will provide on this unstudied area of government operations. Because there is no such analysis currently existent, any increase in public understanding of this issue is a significant contribution to this highly visible and politically important issue as regards the operation and function of government.

Because EELI and ELC have no commercial interests of any kind, disclosure can only result in serving the needs of the public interest.

As such, the requesters have stated "with reasonable specificity that its request pertains to operations of the government," and "the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

2) **Alternately, EELI and ELC qualify as media organizations for purposes of fee waiver**

The provisions for determining whether a requesting party is a representative of the news media, and the "significant public interest" provision, are not mutually exclusive. Again, as EELI and ELC are non-commercial requesters, and are entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*.

Alternately and only in the event EPA deviates from prior practice on similar requests and refuses to waive our fees under the "significant public interest" test, which we will then appeal while requesting EPA proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by... a representative of the news media...") and 40 C.F.R. §2.107(d)(1) ("No search or review fees will be charged for requests by educational institutions... or representatives of the news media."); see also 2.107(b)(6).

However, we note that as documents are requested and likely are by their very nature available electronically, there should be no copying costs.

Requesters repeat by reference the discussion as to their publishing practices, reach and intentions to broadly disseminate, all in fulfillment of EELI and ELC's mission, from pages 19-21, *supra*.

As already discussed with extensive supporting precedent, government information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with Agency activities in this controversial area or, as the Supreme Court once noted, what their government is up to.

For these reasons, requesters qualify as "representatives of the news media" under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for

general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, including after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format; as such, there are no duplication costs other than the cost of a compact disc(s).

CONCLUSION

We expect the Agency to release within the statutory period of time all segregable portions of responsive records containing properly exempt information, and to provide information that may be withheld under FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears").

We expect all aspects of this request be processed free from conflict of interest.

We request the agency provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). EPA must at least inform us of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions; FOIA specifically requires EPA to immediately notify EELI and ELC with a particularized and substantive determination, and of its determination and its reasoning, as well as EELI and ELC's right to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013). See also; *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at *14 (D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request a rolling production of records, such that the Agency furnishes records to our attention as soon as they are identified, preferably electronically,[18] but *as necessary* in hard copy to the address below. We inform EPA of our intention to protect our appellate rights on this matter at the earliest date should EPA not comply with FOIA per, *e.g.*, *CREW v. FEC*.

[18] For any mailing that EPA finds necessary, we request you correspond with counsel, Horner, using 1489 Kinross Lane, Keswick, Virginia, 22947 Attn. Chris Horner.

If you have any questions please do not hesitate to contact undersigned counsel.

Respectfully submitted,

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